APPENDIX B

United States
Environmental Protection
Agency

Office of
Site Remediation
Enforcement (2273G)

May 1995

EPA Overview of Ability To Pay Guidance And Models

The purpose of this document is to identify and briefly describe documents that are relevant to Superfund ability to pay ("ATP") analyses. The documents fall into two general categories: (1) documents that require or provide for consideration of the ability to pay of potentially responsible parties ("PRPs"); and (2) documents that describe methods to determine ATP settlement amounts. The Regions should use documents in the first group in making Superfund ATP determinations. The Regions may also use documents in the second group in conducting ATP settlements until more specific Superfund ATP settlement guidance is provided by Headquarters. **[Note: Users should not rely solely on this summary document in making ability to pay determinations, but should instead read the relevant document(s) in their entirety.]**

A. GENERAL POLICY DOCUMENTS

The following Agency documents describe situations in which a liable party's ability to pay should be considered. Although some of these documents do not deal specifically with CERCLA liability, they represent general Agency policy regarding the use of ability to pay in enforcement cases. For this reason, the documents should be relied upon in situations relating to the ability to pay potential of Superfund PRPs.

1. General Civil Penalty Policy

The *General Civil Penalty Policy* is composed of two documents: *Policy on Civil Penalties* and *A Framework for Statute-Specific Approaches to Penalty Assessments*:

a. Policy on Civil Penalties
(EPA General Enforcement Policy # GM-21)
[February 16, 1984]

This is an Agency guidance document that "establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions." Although this document is intended to address penalty considerations, it is important because it sets forth the Agency's basic philosophy on ability to pay issues in enforcement cases.

This philosophy indicates that under the goal of fair and equitable treatment of the regulated community, the policy must allow for flexibility to adjust penalties. The policy lists certain factors that are to be considered in determining penalty amounts. One of these factors is "ability to pay." The policy also cautions that a reduction of a penalty based on ability to pay is only "appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation."

b. A Framework for Statute-Specific Approaches to Penalty Assessments
(EPA General Enforcement Policy # GM-22)
[February 16, 1984]

A companion to the *Policy on Civil Penalties*, this policy directs EPA staff on the development of medium-specific penalty policies for administratively-imposed penalties and judicial and administrative settlements under statutes enforced by the Agency. It restates and amplifies some of the concepts included in the *Policy on Civil Penalties* document.

Lack of an ability to pay is identified as one circumstance of "compelling public concern" based on which an enforcement case may be settled for less than the economic benefit of noncompliance. This document states that ability to pay settlements are allowed if "[r]emoval of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business."

Three additional requirements are provided for use in ability to pay determinations: 1) the violator has the burden of demonstrating an inability to pay claim; 2) "EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business"; and 3) documenta-

tion of all ability to pay adjustments must be included in case files and other relevant internal documents.

2. Guidance on Determining a Violator's Ability to Pay a Civil Penalty (EPA General Enforcement Policy # GM-56) [December 16, 1986]

This Agency guidance document amplifies the discussion in the *General Civil Penalty Policy* relating to the use of the ability to pay factor in the imposition of civil penalties. This guidance document is directed toward civil penalties imposed on for-profit entities that have not filed for bankruptcy. It establishes a standard for the evaluation of an inability to pay claim by stating that "EPA may consider using the ability to pay factor to adjust a civil penalty when the assessment of a civil penalty may result in extreme financial hardship."

Although this document establishes a standard, it does not determine a specific dollar amount that a party can afford to pay. The guidance requires the examination of various options that a violator has for paying a civil penalty and provides that the Agency may request copies of tax returns and other financial documents to support claims of inability to pay. The document also states that if requested information is not provided, the Agency should seek the full penalty amount.

"ABEL," a computer program that evaluates the financial health of for-profit entities based on the estimated strength of their internally-generated cash flows, is introduced in this guidance. (A more detailed description of ABEL is provided below.) The document notes that, even if the ABEL analysis shows an inability to pay a penalty with internally generated cash flow, the Agency should evaluate other possible sources of payment.

3.* Interim CERCLA Settlement Policy (OSWER # 9835.0) [December 5, 1984]

This Agency guidance document identifies ten criteria governing private party settlements under CERCLA. One criterion is "ability of the settling parties to pay." This document states that "the settlement proposal should discuss the financial condition of that party, and the practical results of pursuing a party for more than the government can hope to actually recover."

4.* Guidance on Documenting Decisions Not to Take Cost Recovery Actions (OSWER # 9832.11) [July 7, 1988]

This document states that the decision to not take a cost recovery action may be based on the finding that a PRP is not financially viable or that it is unable to pay a substantial portion of the claim. This guidance references the *PRP Search Manual* (OSWER # 9834.6).

5.* Transmittal of the Superfund Cost Recovery Strategy (OSWER # 9832.13) [July 29, 1988]

The Superfund cost recovery strategy requires the Agency to consider the "financial ability of the potential defendants to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim" when deciding to issue a cost recovery referral.

6.* Submittal of Ten-Point Settlement Analysis for CERCLA Consent Decrees (OSWER # 9835.14) [August 11, 1989]

Commonly known as the "ten point guidance," this document makes the same reference to ability to pay considerations as the *Interim CERCLA Settlement Policy* document: that the "settlement proposal should discuss the financial condition of [a] party, and the practical results of pursuing a party for more than the government can hope to actually recover."

7.* Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes (OSWER # 9834.13) [December 6, 1989]

This Agency guidance document describes the Agency's interim policy for CERCLA settlements with municipalities. Included in the document is authority to include special settlement provisions "where a municipality has successfully demonstrated to EPA that they are appropriate (e.g., where valid ability to pay or procedural constraints that affect the timing of payment exist)."

8.* Final Penalty Policy for Sections 302, 303, 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Compensation and Liability Act (OSWER # 9841.2) [June 13, 1990]

This penalty policy allows for the reduction of a penalty that is "clearly beyond the financial means of the violator." It reiterates much of what is stated in earlier penalty policy documents, including the use of ABEL and the type of information that is to be relied upon in making an ability to pay determination.

B. DOCUMENTS THAT ASSIST IN DETERMINING ABILITY TO PAY AMOUNTS

The following documents identify methodologies that may be relied upon in conducting an ability to pay analysis. Although the documents which follow provide much useful information for determining an ability to pay amount, none of these documents represent formal Agency guidance directed specifically at Superfund cases.

1. The ABEL Computer Model and Supporting Documentation

The Agency has developed a computer model that assists in identifying whether a settlement amount has the potential to create a financial hardship. The computer program is known as ABEL and the following three documents, *ABEL User's Manual, ABEL User's Guide,* and *Supplement to the ABEL User's Manual: Superfund ABEL,* describe the use of, and methodologies relied upon in performing, an ABEL ability to pay analysis.

ABEL conducts an ability to pay assessment of a for-profit corporation. ABEL projects the ability of the for-profit corporation to pay for the proposed settlement from future earnings and from a delay in reinvestment of capital assets.

The ABEL model will calculate certain common financial ratios that describe the financial strengths and weaknesses of the for-profit corporation. This part of the analysis is called a phase one analysis and can be performed with a minimum of one year of financial information. ABEL requires at least three years of tax data to make a phase two projection. The phase two projection compares the proposed settlement amount with projected future cash flows of a for-profit corporation. The phase two projection then provides the statistical probability that the corporation can pay the proposed settlement from the projected future cash flows.

ABEL is designed to be used by those who are not familiar with financial information. The ABEL documentation informs enforcement personnel that a person experienced in ability to pay analysis must examine the financial information prior to the reduction of a proposed settlement amount if the ABEL analysis indicates an inability to pay.

ABEL is <u>not</u> designed to evaluate the ability to pay of other financial entities such as municipalities, partnerships or individuals.

a. ABEL User's Manual
[October 1991 Version]

This manual provides step-by-step instructions for using the ABEL model. The *ABEL User's Manual* describes how the ABEL model can be used in assessing a for-profit corporation's ability to pay one or more of the following expenditures: civil penalty; environmental clean-up costs; and/or pollution control equipment costs. The *User's Manual* also provides background information on key assumptions used in the model (e.g., reinvestment rate), and how these can be altered by the user.

b. ABEL User's Guide *[October 1991]*

This guide is available in two versions, an "uncut" version for government users of the ABEL model (which contains confidential information) and a non-confidential version for outside users of the model (which is now available for purchase through the National Technical Information Service (NTIS)).

The government version of this document provides internal enforcement guidance on how EPA staff can effectively use the ABEL computer model in settlement negotiations. Specifically, this document describes what additional analyses should be performed if ABEL predicts that a violator's cash flow will not be sufficient to pay proposed penalty and/or cleanup costs.

The *User's Guide* relies upon 3-5 years of federal income tax returns to perform the analysis and also describes other documents that should be requested from a violator, as well as public sources of information.

c. Supplement to the ABEL User's Manual: Superfund ABEL *[September 1992 Version]*

This supplement to the *ABEL User's Manual* provides information on use of the ABEL model for Superfund calculations. The Superfund ABEL model is easier to use when estimating the present value of costs associated with the work that is agreed to be performed. However, the standard values utilized by the Superfund ABEL model relax the criteria for determining a financial hardship. Accordingly, the Superfund ABEL model may identify more financial hardship situations than the standard ABEL model. If the conclusion reached

by the Superfund ABEL model is that the for-profit corporation has the ability to pay, the chances of the corporation demonstrating an extreme financial hardship are small.

2. Beyond ABEL: Ability to Pay Guidance [February 1993]

This guidance document is designed to assist EPA personnel to "go beyond ABEL" and assess ability to pay in cases where the ABEL computer model produces a negative or ambiguous result. Because ABEL is designed as a conservative screening tool that focuses only on internal cash flow, it may produce a negative or ambiguous result when a violator has the ability to pay through other means, such as reduction of unnecessary expenses, sale of or borrowing against assets, or assumption of additional debt.

The guidance gives step-by-step instructions on how to investigate potential sources of funds, and contains worksheets to guide this analysis and to draw attention to key information in tax returns and/or other financial statements. The analysis focuses on identifying luxury assets, undervalued assets, loans to or from officers and shareholders, unnecessary officers' salaries, and certain other expenses. The result is a more sophisticated analysis than that provided by ABEL.

The guidance suggests methods of adjusting an ABEL input to allow ABEL to estimate the ability to pay of sole proprietors, partnerships, and Subchapter S corporations. Also, the guidance provides additional cautions that help to clarify when a financial analyst should be consulted.

3. Individual Ability to Pay Guidance [June 1992]

If a violator files only an individual federal income tax return, ABEL cannot be used. The *Individual Ability to Pay Guidance* was developed by Industrial Economics, Inc., the EPA contractor that supports the ABEL model, for sole proprietor, partnership and individual inability to pay claims in the State of Iowa's underground storage tank (UST) program.

Although this document was not written by EPA, it can be useful in a case involving an individual's inability to pay claim. This document is not a computer program but provides a method to determine an individual's ability to pay. In a method that is similar to the ABEL model, this document draws information from individual tax forms, including Form 1040, Form 1040A, or Form 1040EZ.

This document characterizes the financial strengths and weakness of an individual in comparison to averages determined from income level, family size and county of residence. The document relies on income and expense information to project the availability of income after the payment of identified expenses and to determine if additional debt capacity exists.

The guidance provides advice on how to make a final ability to pay determination, including instructions on topics such as: how to understand the results, when it is appropriate to do additional research and verification (including consultation with a financial analyst), and how to consider extenuating financial circumstances (e.g., current sale or purchase of real estate).

4. Guidance for Calculating Municipal and Not-for-Profit Organizations' Ability to Pay Civil Penalties Using Current Fund Balances [March 1993]

This is a pilot guidance document developed by the Office of Prevention, Pesticides, and Toxic Substances (OPPTS) for use in determining the ability of governmental entities (municipalities) and other not-for-profit (NFP) organizations to pay civil penalties. The document suggests a method of determining the ability to pay from unreserved funds. It does not evaluate other methods of paying for the proposed settlement such as borrowing, raising taxes or paying over time.

The document describes how to use NFP financial statements to perform an ability to pay assessment for three types of organizations: (1) municipalities and states; (2) private colleges and universities; and (3) NFP hospitals. This document also contains background information on financial accounting practices and types of financial statements used by NFP entities, which differ from those used by for-profit companies.

5. The Road to Financing, Assessing and Improving Your Community's Creditworthiness [September 1992]

Developed by the Office of Water, this document provides brief descriptions of municipal financial characteristics and discusses how changes in these financial characteristics will project improvement in a municipality's financial health. It is a useful tool in describing some of the concepts of assessing the ability to pay of a municipality. This document may be useful for those who are unfamiliar with municipal financial characteristics.

6. **Financial Capability Guidebook**
[March 1984]

This Office of Water document is to be used to determine whether a municipality can demonstrate that it can ensure adequate building, operation, maintenance and replacement of a publicly owned treatment works. The most important section of this guidebook is the Supplemental Information Sheet and instructions (pages 52-68). The instructions allow for a characterization of a municipality that is equivalent to what the ABEL analysis does for a business. However, there is one major note of caution. The analysis is not intended for a Superfund ability to pay analysis but for the construction and operation of a publicly owned treatment works. For this reason, the *Guidebook* provides a higher ability to pay estimate than may be applicable.

7. **Financial Review Methodology for Wastewater Discharge Noncompliance Cases**
[September 17, 1984]

This document was prepared by Peat Marwick, an accounting firm, for EPA Region V. The methodology is similar to that in the *Financial Capability Guidebook*, but it allows for a greater number of years of financial information to be examined and a more detailed discussion of the financial indicators. The document has the same limitation as the *Financial Capability Guidebook*, in that it subjects the municipality to a more rigorous standard than Superfund ability to pay settlements.

8. **Ability to Pay Interrogatories**
[June 16, 1994]

This draft OECA document provides model interrogatories, requests for production, and judicial and administrative subpoenas for discovery of information and documents in cases where ability to pay is an issue. The interrogatories are intended to be tailored to specific cases, taking into account the size and structure of the violating entity.

Separate model interrogatories and requests for production of documents are provided for: (1) corporations; and (2) individuals and sole proprietors. Interrogatories to corporations request information on: corporate structure and management; equity and debt; parent and subsidiary entities; insurance coverage; tax and financial information; assets; liquidation of assets; and claims and judgments. Interrogatories to individuals and sole proprietors request information on personal and business assets, liabilities, income, expenses, and other financial matters. **[NOTE: This document can be released only to government employees.]**

9. **Ability to Pay Case Memorandum**
[August 1, 1993]

This Office of Enforcement document summarizes all the significant cases in the area of ability to pay, as of the date of issuance. The memorandum summarizes environmental case law related to topics such as: application of statutory provisions that require ability to pay to be considered in civil penalty assessments (e.g., section 109(a)(3) of CERCLA); which party has the burden of proving an ability (or inability) to pay; factors that may be considered in assessing ability to pay; alternative payment plans; and types of financial information that may be presented to a court on ability to pay issues. **[NOTE: This document can be released only to government employees.]**

ADDITIONAL INFORMATION

If you have any questions or comments on this Fact Sheet, please contact **Bob Kenney (703-603-8931)** or **Leo Mullin (703-603-8975)** of the OSRE Policy and Program Evaluation Division (PPED).

If you would like copies of the documents summarized in this Fact Sheet, they are available from the following sources. Documents identified by an asterisk (*) are found in the *CERCLA Enforcement Policy Compendium*. Copies of the complete Compendium or individual documents may be ordered by EPA personnel from the **Superfund Document Center (703-603-8917)**. [If requesting the complete Compendium, ask for Documents # PB-93-963623 and PB-92-963623; if requesting specific documents, ask for the OSWER document number listed above.] Other referenced documents are available from **Tracy Gipson (202-260-3601)** of the OSRE Regional Support Division.

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EPA

Use of Alternative Dispute Resolution in Enforcement Actions

Introduction

Alternative Dispute Resolution (ADR) is a tool which enhances the negotiating process. ADR is a standard component of EPA's enforcement program. It should be considered at any point when negotiations are possible. This fact sheet answers common questions about the use of ADR in enforcement actions and describes how to use ADR in your case. This is the first in a series of Fact Sheets on ADR use.

What is ADR?

ADR is a short-hand term for a set of processes which assist parties in resolving their disputes quickly and efficiently. Central to each method of ADR is the use of an objective third party or neutral. In this fact sheet the use of the term "ADR" refers to all methods of ADR. The methods used by the Agency include the following:

- **Mediation** is the primary ADR tool used by EPA. It is a process in which a third party, with no decision-making authority, assists disputants to reach a voluntary negotiated settlement. In mediation, EPA retains its control of the case as well as its settlement authority.
- **Convening** involves the use of a third party to organize disputants for negotiations and assist them in deciding whether to use ADR and in the selection of an appropriate ADR professional.
- **Allocation** is the use of third party neutrals to assist the parties in determining their relative responsibilities for Superfund site costs.
- **Fact-finding**, often used in technical disputes, involves the use of a third party with subject-matter expertise to investigate and determine findings of fact.
- **Arbitration** is a decision-making process which can be binding or non-binding. A third party hears the dispute and renders a decision. EPA may enter into binding arbitration for cost recovery claims below $500,000 under CERCLA 122(h)(2), 42 U.S.C. 9622(h)(2).

What is EPA's Policy On Use of ADR?

Use of ADR in appropriate cases has been EPA policy since 1987 (Guidance on the Use of ADR in Enforcement Actions, August 1987). The Administrative Dispute Resolution Act of 1990, (P.L. 101-552), 5 U.S.C. 581, strengthened EPA policy by encouraging the use of ADR in all federal disputes. Also, in 1990 the Civil Justice Reform Act was passed, authorizing that district court judges require parties to attempt mediation prior to litigation. A companion to these Acts, the Executive Order on Civil Justice Reform (No. 12778, October 23, 1991), requires all federal enforcement staff to attempt settlement, and offer use of ADR as appropriate, prior to initiating any litigation.

What is EPA's experience with ADR?

The Agency has used ADR to assist in the resolution of over 50 enforcement-related disputes to date. ADR has been used in negotiations arising under Superfund and the principal environmental statutes that EPA administers. Mediated negotiations have ranged from two-party Clean Water Act cases to Superfund disputes involving upwards of 1200 parties.

Participants in the 1990 ADR pilot for Superfund cases reported the following benefits: constructive working relationships were developed; obstacles to agreement and the reasons therefore were quickly identified; costs of preparing a case for DOJ referral were eliminated; and ongoing relationships were preserved.

What are the benefits of using ADR?

- It lowers the transaction costs for resolving the dispute.
- Mediated negotiations tend to focus more on resolving real issues, rather than posturing, and are less likely to get derailed by personality conflicts.

- In mediation, the parties are more likely to identify settlement options that are tailored to their particular needs.
- It alleviates the time-consuming burdens on EPA of organizing negotiations because a third party neutral is available to handle these tasks. This is particularly valuable in multi-party cases.

How do I know that ADR is appropriate for my case?

If you can answer the following questions affirmatively, then ADR may be appropriate for your case:

- Are there present or foreseeable difficulties in the negotiation which will require time or resources to overcome in order to reach settlement?
- Is your case negotiable, i.e. no precedent-setting issues are involved?
- Is there enough case information to substantiate the violation(s)?
- Is there sufficient time to negotiate in light of court or statutory deadlines, or are the parties willing to sign a tolling agreement (an understanding that a statutory deadline for starting a lawsuit will be extended)?

What ADR is NOT!

- A sign of weakness in the government's case
- A sign of weakness in the government attorneys' negotiation skills
- A depreciation of the government's potential recovery
- A last resort

What ADR services are available?

Assistance regarding the use of ADR is available at any time by phone from the HQ ADR Team and the regional ADR Specialists, who are identified at the end of this fact sheet. EPA has an indefinite services contract for dispute resolution services with RESOLVE, a nationally recognized ADR firm, to provide a wide range of ADR services to case team members. Services available include confidential consultation regarding use of ADR in specific cases, assistance in the location, selection and contracting of ADR professionals, and provision of neutral party services on behalf of the U.S. Trips to regional offices to assist in reviewing cases appropriate for ADR use can be arranged upon request.

How do I find out if anyone in my Region has used ADR?

Speak with your regional ADR Specialist and get a copy of recent ADR status reports.

How do I nominate a Superfund, RCRA corrective action, or Oil Pollution Act case for ADR?

It is a very simple process. For these disputes the ORC staff attorney should prepare a 1-2 page ADR nomination memorandum briefly outlining the substance of the case, the nature of the dispute, and the reasons that ADR would be of benefit to regional settlement efforts. This memorandum will be used as the basis for establishing a contract with the selected ADR professional. The ORC staff attorney should forward the nomination memo to the Regional Counsel, or designee, who has authority to approve the nomination. Then the appropriate regional official needs to commit funding for ADR services.

Consultation with one of the ADR Specialists on the use of ADR in a case should be obtained before the case is nominated. A copy of the nomination memo should be sent to the HQ ADR Liaison and your regional ADR Specialist. A model nomination memorandum is available on disk from your regional ADR Specialist.

What funding is available to pay for EPA's share of ADR expenses in these cases?

Beginning in FY '96 funding for ADR services will shift from HQ to the Regions and will be included as part of each Region's annual extramural Superfund budget based on regional need. If any Region is short of funds, please contact David Chamberlain, at 202-260-4118, and David Batson, HQ ADR Liaison, at 703-603-9004. Additional funding will be provided from the Office of Site Remediation Enforcement (OSRE) based on justified need.

What do I do for cases that arise under other statutes?

For other enforcement cases, the ADR nomination memorandum should be sent to the Division Director within the Office of Regulatory Enforcement who has responsibility for the statute under which the civil action is brought, with a copy to the HQ ADR Liaison and your regional ADR Specialist. The appropriate media program office is consulted upon receipt of the nomination. Funding for non-Superfund cases is approved on a case-by-case basis.

What contract mechanisms are available to obtain ADR services?

The following options are available: (1) the indefinite services contract with RESOLVE, which is managed by the Office of Policy, Planning and Evaluation (OPPE) (Debbie Dalton, Project Officer, 202-260-5495) and (2) expedited sole source contracting authorized by recent changes to federal acquisition regulations. The Regional Enforcement Support Services (ESS) contract may be used to obtain services to support the ADR neutral's efforts. To date, the RESOLVE contract has been the primary vehicle used by the ADR program.

A procurement request and other contracting documents must be submitted for each case to the appropriate contract official, following regional approval of the ADR nomination memorandum. It takes approximately 30 days to process the contracting documents through the contracts office. Models of an ADR procurement request and other contracting documents are available on disk from the HQ ADR Team or your regional ADR Specialist. Each Region should designate a lead staff contact for contract coordination.

Who manages the contract with the selected ADR neutral?

Each site-specific use of ADR requires either a separate contract or delivery order which is managed by the nominating region. To establish a contract or delivery order, the contracts office requires the designation of a Contracting Officer's Representative (COR).[1] The Remedial Project Manager (RPM), On Scene Coordinator (OSC), or other person familiar with the case may serve as a COR.

How does a case team select and contract with an ADR neutral for his/her services? How long does this take?

The selection of an appropriate ADR neutral for a case is by agreement of all parties to the dispute. The regional/DOJ case team represents the U.S. in this decision. Assistance in identifying and considering appropriate neutrals is available from the HQ ADR Team or through EPA's contractor.

The services of the selected ADR neutral are obtained by all the parties to a dispute by entering a contract with the neutral. The contract, generally called a "mediation agreement", covers arrangements for sharing and paying the mediator's fees, the role of the mediator, confidentiality, and the right of any party to withdraw from the mediation. An EPA approved model mediation agreement is available on disk from your regional ADR Specialist or from the HQ ADR Team. You should use this as the basis for your negotiations.

The agreement is negotiated by the case team and the private parties, with assistance, if needed, from the HQ ADR Team or an ADR expert from RESOLVE. Experience has shown that the model agreement is generally acceptable to private parties and it should take no longer than two weeks to obtain a signed agreement.

Does a Region have the authority to sign the agreement with the ADR professional?

Yes. Once the funding has been committed by the Agency, the Region, generally the staff attorney, signs the agreement for EPA.

How much does it usually cost to use ADR in a case?

The cost of ADR services is determined by several factors, including the ADR professional's fees and travel, costs of meeting space, and the length of settlement discussions. All costs associated with the selected ADR process are shared equitably among the parties. EPA staff should keep the Agency's share payment commensurate with EPA's interest in the ADR process. At present, the Agency may pay 100% of the convening process and up

[1] Under the new contracting regulations, all Delivery Order Project Officers (DOPOs) and Work Assignment Managers (WAMs) are referred to as CORs.

to 50% of the ADR costs, where the Agency is a party to the selected ADR process. The estimated average historic mediation cost to EPA in Superfund cases is approximately $20,000. Given the smaller number of parties generally involved, it is anticipated that the cost of mediating a RCRA case will be less expensive than for Superfund actions.

The Agency may, in appropriate circumstances, help to defray private parties' costs of obtaining ADR services in allocation deliberations. The Agency may pay up to 20% of the costs of ADR services in these situations.

Why must the costs associated with using ADR in an enforcement actions be shared equitably by the parties?

Two reasons. First, to enhance the neutrality of the ADR professional involved, it is important that the costs be shared by all parties to the extent possible. Second, several federal statutes, including the Miscellaneous Receipts Act, prohibit an agency from augmenting its congressionally-approved budget with services paid for by outside parties. Therefore, EPA must share the costs of a neutral's services with the other parties to an enforcement dispute.

Are government payments made to an ADR professional in a Superfund action tracked and recoverable as site costs for cost recovery purposes?

Expenditures by the Agency in support of the use of ADR in a Superfund action are cost recoverable expenses, reimbursement of which may be obtained through regional settlements or legal action. Regions may exercise their enforcement discretion regarding recovery of ADR expenditures. Each ADR case is assigned a separate delivery order or contract to allow for site tracking of ADR expenses.

Is ADR training available?

Yes. A one day overview training on the use of ADR in enforcement negotiations is offered in all of the regions each year. Furthermore, there are ADR components in several other popular EPA training courses. If you are interested in the training schedule for the current year call Rhonda Pierce at 202-260-8174.

How do I get copies of ADR guidances, reports and other related information?

The materials listed below are available at no charge to EPA employees from the National Technical Information Service (NTIS) (phone: 703-487-4650). You will need to provide NTIS with the number in brackets.

"Guidance on Use of ADR in Enforcement Cases" (1990), [PB94-963669], OSWER No. 9208.0-10.

"Guidance on Use of ADR for Litigation in Federal Courts" (DOJ, 1992), [PB94963-668], OSWER No. 9208.0-09.

"Enforcement Mediation-Status on Use of ADR in Enforcement Actions", [PB94963670], OSWER No. 9208.0-11.

"Superfund Enforcement Mediation Region V Pilot Results", [PB94-963671], OSWER No. 9208.0-12.

"Superfund Enforcement Mediation Case Studies", [PB94-963672], OSWER No. 9208.0-13.

ADR Specialists

Office	Name	Phone #	Fax #
Region 1	Ellie Tonkin	617/565-1154	565-1141
	Marcia Lamel	565-3435	
	Bruce Marshall*	573-9686	573-9662
Region 2	Tom Lieber	212/637-3158	637-3115
	Elena Kissel	637-3182	
	Janet Feldstein*	637-4417	637-4429
Region 3	Pat Hilsinger	215/597-2618	597-3235
	Laura Janson*	597-2393	597-9890
Region 4	Simon Miller	404/347-2641 x 2282	347-5246
	Charles Swan*	347-5059 x6194	347-7817
Region 5	John Tielsch	312/353-7447	886-7160
	Tinka Hyde*	886-9296	886-4071
Region 6	Miles Schulze	214/665-8049	665-2192
	Jim Dahl	665-2151	
	Carl Bolden*	665-6713	665-6460
Region 7	Bob Richards	913/551-7502	551-7925
	Linda Garwood*	551-7268	551-7063
Region 8	Suzanne Bohan	303/294-7591	294-7653
	Barry Levene*	293-1843	293-1238
Region 9	Shauna Woods	415/744-1360	744-1041
	Kim Muratore*	744-2373	744-1917
Region 10	Ted Yackulic	206/553-1218	553-0163
	Steve Mullen*	553-6520	553-0124

*Waste Management or Hazardous Waste division contact. Other names are in ORC.

HQ ADR Team	Name	Phone #	Fax #
ADR Liaison	David Batson	703/603-9004	603-9117 603-9119
OSRE/RSD	Rhonda Pierce	202-260-8174	260-3069
OSRE/PPED	Ellen Kandell	703/603-8996	603-9117

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Office of Enforcement and
Compliance Assurance

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EPA

Policy Toward Owners of Property Containing Contaminated Aquifers

Office of Site Remediation Enforcement
Policy and Program Evaluation Division 2273G

This fact sheet summarizes a new EPA policy regarding groundwater contamination. The "Policy Toward Owners of Property Containing Contaminated Aquifers" was issued as part of EPA's Brownfields Economic Redevelopment Initiative which helps states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

EPA issued this policy to help owners of property to which groundwater contamination has migrated or is likely to migrate from a source outside the property. This fact sheet is based on EPA's interpretation of the Comprehensive Environmental Response, Compensation , and Liability Act (CERCLA, commonly known as Superfund) and existing EPA guidance. Under the policy, EPA will not take action to compel such property owners to perform cleanups or to reimburse the agency for cleanup costs. EPA may also consider *de minimis* settlements with such owners if they are threatened with law suits by third parties.

Background

Approximately eighty-five percent of the sites listed on the National Priorities List involve some degree of groundwater contamination. The effects of such contamination are often widespread because of natural subsurface processes such as infiltration and groundwater flow. It is sometimes difficult to determine the source of groundwater contamination.

Under Section 107(a)(1) of CERCLA (also found at 42 United States Code § 9607(a)(1)), any "owner" of contaminated property is normally liable regardless of fault. This section of CERCLA creates uncertainty about the liability of owners of land containing contaminated aquifers who did not cause the contamination. This uncertainty makes potential buyers and lenders hesitant to invest in property containing contaminated groundwater. The intent of the Contaminated Aquifer Policy is to lower the barriers to the transfer of property by reducing the uncertainty regarding future liability. It is EPA's hope that by clarifying its approach towards these landowners, third parties will act accordingly.

Policy Summary

EPA will exercise its enforcement discretion by not taking action against a property owner to require clean up or the payment of clean-up costs where: 1) hazardous substances have come to the property solely as the result of subsurface migration in an aquifer from a source outside the property, and 2) the landowner did not cause, contribute to, or aggravate the release or threat of release of any hazardous substances. Where a property owner is brought into third party litigation, EPA will consider entering a *de minimis* settlement.

Elements of the Policy

There are three major issues which must be analyzed to determine whether a particular landowner will be protected from liability by this policy:

- the landowner's role in the contamination of the aquifer;
- the landowner's relationship to the person who contaminated the aquifer; and
- the existence of any groundwater wells on the landowner's property that affect the spread of contamination within the aquifer.

Landowner's Role in the Contamination of the Aquifer

A landowner seeking protection from liability under this policy must not have caused or contributed to the source of contamination. However, failure to take steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, preclude a landowner from the protection of this policy.

Landowner's Relationship to the Person who Caused the Aquifer Contamination

First, this policy requires that the original contamination must not have been caused by an agent or employee of the landowner. Second, the property owner must not have a contractual relationship with the polluter. A contractual relationship includes a deed, land contract, or instrument transferring possession. Third, Superfund requires that the landowner inquire into the previous ownership and use of the land to minimize liability. Thus, if the landowner buys a property from the person who caused the original contamination after the contamination occurred, the policy will not apply if the landowner knew of the disposal of hazardous substances at the time the property was acquired. For example, where the property at issue was originally part of a larger parcel owned by a person who caused the release and the property is subdivided and sold to the current owner, ***who is aware of the pollution and the subdivision***, there may be a direct or indirect "contractual relationship" between the person that caused the release and the current landowner. In this instance, the owner would not be protected by the policy.

In contrast, land contracts or instruments transferring title are not considered contractual relationships under CERCLA if the land was acquired after the disposal of the hazardous substances and the current landowner did not know, and had no reason to know, that any hazardous substance had migrated into the land.

The Presence of a Groundwater Well on the Landowner's Property and its Effects on the Spread of Contamination in the Aquifer

Since a groundwater well may affect the migration of contamination in an aquifer, EPA's policy requires a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer.

Common Questions Regarding Application of the Policy

"If a prospective buyer knows of aquifer contamination on a piece of property at the time of purchase, is he or she automatically liable for clean-up costs?"

No. In such a case the buyer's liability depends on the seller's involvement in the aquifer contamination. If the seller would have qualified for protection under this policy, the buyer will be protected. For example, if the seller of the property was a landowner who bought the property without knowledge, did not contribute to the contamination of the aquifer and had no contractual relationship with the polluter, then the buyer may take advantage of this policy, ***despite*** knowledge of the aquifer contamination.

In contrast, if the seller has a contractual relationship with the polluter and the buyer ***knows*** of the contamination, then this policy will not protect the buyer.

"If an original parcel of property contains one section which has been contaminated by the seller and another uncontaminated section which is threatened with contamination migrating through the aquifer, can a buyer be protected under the policy if he or she buys the threatened section of the property?"

The purchase of the threatened parcel separate from the contaminated parcel establishes a contractual relationship between the buyer and the person responsible for the threat. This policy will not protect such a buyer unless the buyer can establish that he or she did not know of the pollution at the time of the purchase and had no reason to know of the pollution. To establish such lack of knowledge the buyer must prove that at the time he acquired the property he inquired into the previous ownership and uses of the property.

Protection from Third Party Law Suits

Finally, EPA will consider *de minimis* settlements with landowners who meet the requirements of this policy if a landowner has been sued or is threatened with third-party suits. A *de minimis* settlement is an agreement between the EPA and a landowner who may be liable for clean up of a small portion of the hazardous waste at a particular site. To be eligible for such a settlement, the landowner must not have handled the hazardous waste and must not have contributed to its release or the threat of its release. Once the EPA enters into a *de minimis* settlement with a landowner, third parties may not sue that landowner for the costs of clean-up operations.

Whether or not the Agency issues a *de minimis* settlement, EPA may seek the landowner's full cooperation (including access to the property) in evaluating and implementing cleanup at the site.

For Further Information

This policy was issued on May 24, 1995 and published in the *Federal Register* on July 3, 1995 (volume 60, page 34790). You may order a copy of the policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5825 Port Royal Rd., Springfield, VA 22161.

Orders must reference NTIS accession number **PB96-109145.**

For telephone orders or further information on placing an order, call NTIS at:
(703)487-4650 for regular service, or
(800)553-NTIS for rush service.

For orders via e-mail/Internet, send to the following address:
orders@ntis.fedworld.gov

For more information about the Contaminated Aquifer Policy, call Ellen Kandell at (703)603-8996.

United States Environmental Protection Agency | Office of Enforcement and Compliance Assurance | December 1995

EPA

The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities

Office of Site Remediation Enforcement | Quick Reference Fact Sheet

Units of state, local, and federal government sometimes involuntarily acquire contaminated property as a result of performing their governmental duties. Government entities often wonder whether these acquisitions will result in Superfund liability. This fact sheet summarizes EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. This fact sheet also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

Introduction

EPA's Brownfields Economic Redevelopment Initiative is designed to help states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Many municipalities and other government entities are eager for brownfields to be redeveloped, but often hesitate to take any steps at these facilities because they fear that they will incur Superfund liability.

This fact sheet answers common questions about the effect of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund, and set forth at 42 United States Code beginning at Section 9601) on involuntary acquisitions by government entities. EPA hopes that this fact sheet will facilitate government entities' plans for redevelopment of brownfields and the "brokerage" of those facilities to prospective purchasers.

What is an involuntary acquisition?

EPA considers an acquisition to be "involuntary" if it meets the following test:

- The government's interest in, and ultimate ownership of, the property exists only because **the actions of a non-governmental party give rise to the government's legal right to control or take title to the property**.

For example, a government's acquisition of property for which a citizen failed to pay taxes is an involuntary acquisition because the citizen's tax delinquency gives rise to the government's legal right to take title to the property.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA?

To protect certain parties from liability, CERCLA contains both liability exemptions and affirmative defenses to liability. A party who is exempt from CERCLA liability with respect to a specified act cannot be held liable under CERCLA for committing that act. A party who believes that he or she has an affirmative defense to CERCLA liability must prove so by a preponderance of the evidence.

After it involuntarily acquires contaminated property, a unit of state or local government will generally be exempt from CERCLA liability as an owner or operator. In addition, the unit of state or local government will have a somewhat redundant affirmative defense to CERCLA liability known as a "third-party" defense, provided other requirements for the defense, which are described below, are met. A federal government entity that involuntarily acquires contaminated property and meets the requirements described below will have a third-party defense to CERCLA liability.

The requirements for a third-party defense to CERCLA liability are the following:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

A government entity will not have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination from the property. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Government entities should therefore ensure that they do not cause or contribute to the actual or potential release of hazardous substances at facilities that they have acquired involuntarily. For more information, see 42 U.S.C. 9601(20)(D), 9607(b)(3), and 9601(35)(A) and (D).

It is also important to note that the liability exemption and defense described above do not shield government entities from any potential liability that they may have as "generators" or "transporters" of hazardous substances under CERCLA. For additional information, see 42 U.S.C. 9607(a).

What are some examples of involuntary acquisitions?

CERCLA provides a non-exhaustive list of examples of involuntary acquisitions by government entities. These examples include **acquisitions following abandonment, bankruptcy, tax delinquency, escheat** (the transfer of a deceased person's property to the government when there are no competent heirs to the property), **and other circumstances in which the government involuntarily obtains title by virtue of its function as a sovereign.**

What is EPA's official policy regarding CERCLA enforcement against government entities that involuntarily acquire contaminated property?

In 1992, EPA issued its Rule on Lender Liability Under CERCLA ("Rule"), 57 *Federal Register* 18344 (April 29, 1992). The Rule included a discussion of involuntary acquisitions by government entities. In 1994, the Rule was invalidated by the court.

In September 1995, EPA and the U.S. Department of Justice (DOJ) issued their "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" ("Lender Policy"). In the document, EPA and DOJ reaffirm their intentions to follow the provisions of the Rule as enforcement policy. The Lender Policy advises EPA and DOJ personnel to consult both the Rule and its preamble while exercising their enforcement discretion with respect to government entities that acquire property involuntarily. Most of the relevant portions of the Rule and preamble have been summarized in this fact sheet.

Under the Lender Policy, EPA has expanded the examples listed in CERCLA by describing the following categories of involuntary acquisitions:

- Acquisitions made by government entities **acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority** (such as acquisition of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by government entities through **foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program**; and
- Acquisitions by government entities **pursuant to seizure or forfeiture authority**.

Similar to the examples listed in CERCLA, EPA's list of categories of involuntary acquisitions is non-exhaustive. To determine whether an activity not listed in CERCLA or under the Lender Policy is an "involuntary acquisition," one should analyze whether the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.

If a government entity takes some sort of voluntary action before acquiring the property, can the acquisition still be considered "involuntary"?

Yes. Involuntary acquisitions, including the examples listed in CERCLA, generally require some sort of discretionary, volitional action by the government. A government entity need not be completely "passive" in order for the acquisition to be considered "involuntary" for purposes of CERCLA. For further discussion, see 57 *Fed. Reg.* 18372 and 18381.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA to potentially responsible parties and other non-federal entities?

If a unit of state or local government involuntarily acquires property through any of the means listed in CERCLA, it will be exempt from CERCLA liability as an owner or operator. In addition, any government entity will have a third-party defense to CERCLA liability if all relevant requirements for that defense are met (see above).

If a government entity acquires property through any other means, it appears likely — based on the way that courts have treated lender issues during the last few years — that a court would apply principles and rationale that are consistent with EPA and DOJ's Lender Policy. Analysis of these acquisitions may require an examination of case law and state or local laws.

If someone dies and leaves contaminated property to a government entity, is this considered an involuntary acquisition?

No, this type of property transfer is not considered an involuntary acquisition under CERCLA. However, CERCLA provides a third-party defense for parties that acquire property by inheritance or bequest (a gift given through a will). Thus, a government entity that acquires property in this manner will have a third-party defense to CERCLA liability if all relevant requirements of that defense are met and the government entity has not caused or contributed to the release or threatened release of contamination from the property (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A) and (D).

Will a government entity that uses its power of eminent domain be liable under CERCLA?

After a government entity acquires property through the exercise of eminent domain (the government's power to take private property for public use) by purchase or condemnation, it will have a third-party defense to CERCLA liability if all requirements for that defense are met (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A).

Will parties that purchase contaminated property from government entities also be exempt from CERCLA liability?

No. Nothing in CERCLA allows non-governmental parties to be exempt from liability after they knowingly purchase contaminated property. However, EPA encourages prospective purchasers of contaminated property to contact their state environmental agencies to discuss these properties on a site-by-site basis. At sites where an EPA action has been taken, is ongoing, or is anticipated to be undertaken, various tools, including "prospective purchaser agreements," may be an option.

For Further Information

The Lender Policy was published in the *Federal Register* in Volume 60, Number 237, at pages 63517 to 63519 (December 11, 1995).

You may order copies of the Lender Policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number **PB95-234498**. For telephone orders or further information on placing an order, call NTIS at **703-487-4650** for regular service or **800-553-NTIS** for rush service. For orders via e-mail/Internet, send to the following address:

orders@ntis.fedworld.gov

If you have questions about this fact sheet, contact Laura Bulatao of EPA's Office of Site Remediation Enforcement at (202) 564-6028.

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Using Supplemental Environmental Projects to Facilitate Brownfields Redevelopment

Office of Site Remediation Enforcement
Policy and Program Evaluation Division 2273A

In April 1998, EPA issued the final "Supplemental Environmental Projects Policy." In that policy EPA encourages the use of Supplemental Environmental Projects in the settlement of environmental enforcement actions. Using SEPs to assess or cleanup brownfield properties is an effective way to enhance the environmental quality and economic vitality of areas in which the enforcement actions were necessary.

Introduction

In settlements of environmental enforcement cases, defendant/respondents often pay civil penalties. EPA encourages parties to include Supplemental Environmental Projects (SEPs) in these settlements and will take SEPs into account in setting appropriate penalties. While penalties play an important role in deterring environmental and public health violations, SEPs can play an additional role in securing significant environmental and public health protection and improvement. EPA's final Supplemental Environmental Projects Policy (SEP Policy) describes seven categories of SEPs, the legal guidelines for designing such projects, and the methodology for calculating penalty credits. In certain cases, SEPs may facilitate the reuse of "brownfield" property. This fact sheet answers common questions about how SEPs can be used in the brownfields context.

What are Brownfields?

EPA defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. In many cases assessment of the environmental condition of a property is all that is necessary to spur its reuse. Through the Brownfields Economic Development Initiative, EPA has developed a number of tools to prevent, assess, safely cleanup and promote the sustainable reuse of brownfields. SEPs are one of the tools that can be used at brownfields properties.

What is a SEP?

A SEP is an environmentally beneficial project that a defendant/respondent agrees to undertake in settlement of a civil penalty action, but that the defendant/respondent is not otherwise legally required to perform. In return, a percentage of the SEP's cost is considered as a factor in establishing the amount of a final cash penalty. SEPs enhance the environmental quality of communities that have been put at risk due to the violation of an environmental law.

Meeting Legal Requirements

The SEP Policy has been carefully structured to ensure that each SEP negotiated by EPA is within the Agency's authority and consistent with statutory and Constitutional requirements. Although all of the legal requirements in the Policy must be met when considering a SEP at a brownfield, the following requirements are particularly important:

SEPs at Brownfields Cannot Include Action that the Defendant/Respondent is Otherwise Legally Required to Perform

Activities at a brownfield site for which the defendant/respondent is otherwise legally required to perform under federal, state, or local law or regulation cannot constitute a SEP. This restriction includes actions that the defendant/respondent is likely to be required to perform (1) as injunctive relief in any action brought by EPA or another regulatory agency, or (2) as part of an order or existing settlement in another legal action. This restriction does not pertain to actions that a regulatory agency could compel the defendant/respondent to undertake if the Agency is *unlikely* to exercise that authority.

As a general rule, if a party owns a brownfield or is responsible for the primary environmental degradation at a site, assessment or cleanup activities cannot constitute a SEP.

SEPs at Brownfields Require an Adequate Nexus between the Violation and the Project

The SEP Policy requires that a relationship, or nexus, exist between the violation and the proposed project. A SEP at a brownfield will generally satisfy the nexus requirement if the action enhances the overall public health or environmental quality of the area put at risk by the violation.

A SEP is not required to be at the same facility where the violation occurred provided that it is within the same ecosystem or within the immediate geographical area. In general, the nexus requirement will be satisfied if the brownfield is within a 50 mile radius of the site from which the violation occurred. However, location alone is not sufficient to satisfy the nexus requirement --- the environment where the brownfield is located must be affected or potentially threatened by the violation.

A relationship between the statutory authority for the penalty and the nature of the SEP is not required in order for the nexus test to be met. Therefore, the violation need not relate to hazardous waste or contaminated properties in order for EPA to consider a SEP at a brownfield. (e.g., in the case of a Clean Air Act violation, EPA could approve a SEP at a brownfield).

SEPs at Brownfields Cannot Include Action that the Federal Government is Likely to Undertake or Compel Another to Undertake

If EPA or another federal agency has a statutory obligation to assess, investigate, or take other response actions at a brownfield, or to issue an order compelling another to take such action, the Agency may not negotiate a SEP whereby the defendant/respondent carries out those activities.

As a general rule, SEPs are inappropriate at the following site types because of EPA's statutory obligations:

- sites on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), § 105, 40 CFR Part 300, Appendix B;

- sites where the federal government is planning or conducting a removal action pursuant to CERCLA § 104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.415; and

- sites for which the defendant/respondent or other party would likely be ordered to perform an assessment, response, or remediation activity pursuant to CERCLA § 106, the Resource Conservation and Recovery Act (RCRA), § 3013, § 7003, § 3008(h), the Clean Water Act (CWA) § 311, and other federal law.

SEPs may be Performed at Brownfields Involuntarily Acquired by Municipalities

As stated above, if EPA would likely issue an order compelling a Party to cleanup a brownfield, such remedial action cannot be the subject of a SEP. Pursuant to the portion of the CERCLA Lender Liability Rule addressing involuntary acquisitions, 40 C.F.R. § 300.115, the Agency will not issue a remediation order to a municipality that has involuntarily acquired a brownfield even if the Agency would otherwise issue such an order to a private owner. Therefore, if

(1) a brownfield is acquired involuntarily by a local government,
(2) there are no other potential liable parties, and
(3) the known level of contamination would not compel the Agency to take action itself,

a SEP at this property would be appropriate.

SEPs May Be Limited at Brownfields that Received Federal Funds

A SEP cannot provide a municipality, state, or other entity that has received a federal Brownfields Assessment Demonstration Pilot or other federal brownfields grant with additional funds to perform a specific task identified within the assistance agreement. If a defendant/respondent proposes a SEP whereby the party provides money to a local government to assess or cleanup a brownfield, the municipality must not have received a federal grant to carry out the same work. Similarly, a defendant/respondent cannot on its own undertake assessment or other response work at a brownfield when a grant recipient has received federal funds to undertake the same project. A SEP could, however, include additional cleanup activities at a site so long as those activities are not the same as those performed with federal brownfield funding. For example, at a site which a federal Brownfields Targeted Site Assessment is performed, a SEP that cleans up the same site would be an appropriate project (provided that a CERCLA 104(a) removal action is not warranted).

Selecting an Appropriate SEP Activity for a Brownfield Site

The SEP Policy identifies two categories of SEPs that are appropriate for brownfields.

Environmental Quality Assessment Projects

In general terms, environmental quality assessments involve investigating or monitoring the environmental media at a property. To be eligible as SEPs, such activities must be conducted in accordance with recognized protocols, if applicable, for the type of work to be undertaken.

Assessment projects may not, as indicated, include work that the federal government would undertake itself or issue an order to accomplish. Therefore if a SEP involves an assessment of site conditions at a brownfield, the site must not be one where EPA is planning or conducting assessment activities. Both CERCLIS and EPA's Pre-CERCLIS Screening Guidance are useful to determine whether a federal assessment is warranted or planned.

Environmental Restoration Projects

For sites at which contamination does exist, but where an EPA response action or order to a party is not warranted, a SEP may involve removing or remediating contaminated media or material. Restoration SEPs can involve restoring natural environments, such as ecosystems, or man-made environments, such as facilities and buildings. Creating conservation land, such as transforming a former landfill into wilderness land may be an appropriate SEP. The removal of substances that the federal government does not have clear authority to address, such as contained asbestos or lead paint, may also constitute an appropriate restoration project.

Community Input

No one can judge the value to a community of an assessment or cleanup project at a brownfield better than the community in which the site is located. Local communities are the most affected by environmental violations, and have the most to gain by SEPs that address their concerns. Therefore, in appropriate cases local communities should be afforded an opportunity to comment on and contribute to the design of proposed SEPs at brownfield sites. Accordingly, Regions are encouraged to promote public involvement in accordance with the Community Input procedures set forth within the SEP Policy.

Evaluation Checklist for SEPs at Brownfields

On the next page, two examples are provided to demonstrate typical proposals Regions may receive from parties that wish conduct SEPs at brownfields. One of the proposals would be approved and the other would not. A checklist of questions along with answers is provided to demonstrate the analysis Regions should apply when considering such requests.

Further Information: If you have any questions regarding this fact sheet, please contact David Gordon at (202) 564-5147 within the Office of Site Remediation Enforcement. To access the SEP Policy on the internet, open page http://es.epa.gov/oeca/sep/guiddoc.html. For Information about EPA's Brownfield Economic Development Initiative go to page http://www.epa.gov/brownfields.

Hypothetical A:

The Company A owns and operates a manufacturing facility in downtown Cityville. The company uses solvents as part of its manufacturing process. During its operation, Company A discharges wastewater into the Running River. EPA alleges that on at least one occasion, the level of solvents in the wastewater exceeded the level specified in EPA's effluent standards under the Clean Water Act.

EPA filed a civil complaint seeking penalties for the CWA violation. Company A proposed doing a SEP to partly reduce the penalty. The project involves assessing the environmental conditions of a nearby abandoned lot. The lot is owned not by the Company, but by the Cityville government, which obtained title from the previous owner via tax foreclosure. To date, Cityville has been attempting to interest developers in the property but to no avail due to concerns regarding possible contamination from a prior industrial operation at the lot. To determine the extent of contamination, Cityville recently received a federal Brownfields Assessment Demonstration Pilot.

Hypothetical B:

Company B owns and operates a factory in downtown Springfield. EPA conducted an inspection of the factory's air emissions and determined that the Company has violated certain Clean Air Act (CAA) standards resulting in the release of air pollutants into the nearby neighborhood.

EPA filed a civil complaint seeking penalties for the CAA violations. Company B proposed doing a SEP that involves the cleanup of debris at an abandoned parcel located several blocks away, downwind from Company B's factory. The lot is filled with used tires and abandoned trash, and is infested with vermin. The lot is the site of a former bakery which long ago went bankrupt. There is no history of any past industrial operation on-site.

CHECKLIST

□ **Does the project contribute to the revitalization of an abandoned, idled, or under-used industrial or commercial property where redevelopment has been complicated by real or perceived environmental contamination?**
A. Yes. Conducting soil sampling will help revitalize the abandoned lot because it will resolve the questionable environmental condition of the property that has discouraged developers.
B. Yes. Cleaning up the used tires and trash and addressing the vermin problem at this former bakery site will make the property more attractive to developers.

□ **Does the project include actions that the defendant/respondent would otherwise likely be required to perform under federal, state, or local law or regulation? Is there a court or administrative order or existing settlement agreement that would obligate the defendant/respondent to undertake the proposed project?**
A. No. Company A does not own the property, and there is no reason to suspect that Company A would be responsible for any contamination that may be discovered at the site.
B. No. Company B does not own the property, and there is no reason to suspect that the company would be required under federal, state, or local law to remove debris from the site.

□ **Is there an adequate nexus between the violation and the brownfield? Is the project within the same ecosystem or within a 50 mile radius of the facility where the violation occurred?**
A. Yes. The site is located close to the Company's facility, and the proposed SEP addresses the same ecosystem and human population threatened by the Company's wastewater discharge.
B. Yes. The abandoned parcel is located downwind of Company B's factory. The proposed SEP addresses the same ecosystem and human population threatened by the illegal air emissions.

□ **Does the SEP address environmental conditions that the federal government is statutorily obligated to either address itself or order another to address? Is the site on CERCLA's National Priorities List? Is the Agency likely to conduct a removal under CERCLA, or might the Agency order any party to perform remediation activity pursuant to CERCLA, RCRA, or the CWA?**
A. No. There is no indication that EPA has documented any contamination at the site or would investigate the abandoned lot. Therefore, there is no reason to believe that the Agency would consider conducting an investigation or removal action or compel any party to undertake such activities.
B. No. There is no indication that the federal government has a statutory obligation to remove debris from the abandoned parcel. The site is not on the National Priorities List, and there is no reason to believe that the types of debris at issue would warrant the Agency to conduct a removal action or compel any party to undertake any response activity.

□ **Does the SEP provide a municipality, state, or other entity that has received a federal brownfields grant additional funds to perform a specific task identified within the assistance agreement? Does the defendant/respondent seek to undertake work at a site where a federal grant recipient has received an award to undertake the same work?**
A. Yes. Cityville has received funding through a federal Brownfields Assessment Demonstration Pilot.
B. No. There is no indication that Springfield or any entity has received a federal grant to clean up the property.

□ **Does the SEP involve an Environmental Quality Assessment Project or an Environmental Restoration Project?**
A. Yes. The soil sampling project can be categorized as an Environmental Quality Assessment Project.
B. Yes. Removal of the debris can be categorized as an Environmental Restoration Project.

DETERMINATION

A. The SEP proposed by Company A does not satisfy all the requirements because Cityville has received funding through a National Brownfields Assessment Demonstration Pilot. (A SEP at this site that is limited to cleanup activities might be appropriate depending on the extent of contamination.)
B. The SEP proposed by Company B satisfies all requirements and may be approved.